Re Eng Poh Hong @ Wong Choon Ming; ex parte MBF Leasing Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D8–29–799 OF 2006
KANG HWEE GEE J
9 OCTOBER 2007

Bankruptcy — Notice — Application to set aside — Whether judgment order a basis for application for bankruptcy notice — Whether issue was res judicata — Whether notice was served late — Bankruptcy Act 1967 s 3(1)(i) — Bankruptcy Rules 1967 r 96

This was an appeal by the judgment debtor against the decision of the senior assistant registrar ('SAR') in dismissing the judgment debtor's application to set aside the bankruptcy notice issued against him. The judgment debtor's grounds were, inter alia, the judgment obtained should not have been the basis of the application for the bankruptcy notice as this was not a final judgment for a debt due to the judgment creditor, the judgment creditor had earlier filed a bankruptcy notice based on the same judgment and this had been dismissed by the SAR (res judicata) and the bankruptcy notice was served more than three months after it was issued, contrary to r 96 of the Bankruptcy Rules 1969 ('the Rules'). The judgment creditor replied, inter alia, that the judgment order came within s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') that there was an earlier bankruptcy notice filed but subsequently they were informed that they could file a fresh bankruptcy notice and an extension had been obtained.

Held, allowing the appeal with costs:

(1) Res judicata was applicable in this case. A hearing of an appeal to a judge in chambers from the decision of the SAR is to be treated as a 'one piece' hearing and to be heard by way of a rehearing by the judge as if the matter had come before him for the first time. For so long as the hearing of the appeal before the judge in chambers was still pending the matter could not therefore be construed as having been fully adjudicated upon (see para 5).

(2) The judgment order clearly stated that the judgment creditor was entitled to specific performance compelling the defendant to purchase

the plaintiff's shares. The order required the defendant to purchase and not to pay a judgment debt. The order was not a 'final judgment' to have enabled the judgment creditor to apply for a bankruptcy notice under s 3(1)(i) of the Act. The appropriate step that the judgment creditor should have embarked upon was to institute a contempt proceeding against the judgment debtor and not to have petitioned for bankruptcy (see para 6(1)).

(3) The bankruptcy notice had expired when it was served on the judgment debtor, the extension having been obtained only after it was served (see para 6(2)).

[Bahasa Malaysia summary

Ini merupakan rayuan oleh penghutang penghakiman terhadap keputusan penolong pendaftar kanan ('PKP') yang menolak permohonan penghutang penghakiman untuk mengenepikan notis kebankrapan yang telah dikeluarkan terhadapnya. Alasan-alasan penghutang penghakiman adalah, antara lain, penghakiman yang telah diperoleh tidak patut dijadikan asas permohonan untuk notis kebankrapan kerana ini bukan penghakiman muktamad untuk hutang yang perlu diberikan kepada pemiutang penghakiman, pemiutang penghakiman telah sebelum ini memfailkan notis kebankrapan berdasarkan penghakiman yang sama dan ini telah ditolak oleh PKP (res judicata) dan notis kebankrapan telah diserahkan lebih dari tiga bulan selepas ia dikeluarkan, bertentangan dengan k 96 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah tersebut'). Pemiutang penghakiman menjawab, antara lain, bahawa perintah penghakiman tersebut terangkum dalam s 3(1)(i) Akta Kebankrapan 1967 ('Akta tersebut'), bahawa terdapat notis kebankrapan yang lebih dahulu telah difailkan tetapi kemudiannya mereka dimaklumkan bahawa mereka boleh memfailkan notis kebankrapan baru dan lanjutan masa telah diperoleh.

Diputuskan, membenarkan rayuan dengan kos:

(1) Res judicata terpakai dalam kes ini. Perbicaraan sesuatu rayuan kepada hakim dalam kamar daripada keputusan PKP hendaklah dianggap sebagai perbicaraan 'one piece' dan akan didengar melalui perbicaraan semula oleh hakim seperti perkara tersebut dikemukakan di hadapannya untuk kali pertama. Selagi perbicaraan rayuan di hadapan hakim dalam kamar masih belum selesai perkara tersebut tidak boleh ditafsirkan sebagai telah diadili sepenuhnya (lihat perenggan 5).

(2) Perintah penghakiman jelas menyatakan bahawa pemiutang penghakiman berhak terhadap pelaksanaan spesifik yang mendesak

A defendan membeli saham-saham plaintif. Perintah tersebut menghendaki defendan membeli dan bukan untuk membayar hutang penghakiman. Perintah tersebut bukan 'final judgment' yang membolehkan pemiutang penghakiman memohon notis kebankrapan di bawah s 3(1)(i) Akta. Langkah sesuai yang patut diambil oleh B pemiutang penghakiman adalah untuk memulakan prosiding penghinaan terhadap penghutang penghakiman dan bukan untuk membuat petisyen kebankrapan (lihat perenggan 6(1)).

(3) Notis kebankrapan tersebut telah tamat tempoh semasa ia diserahkan kepada penghutang penghakiman kerana lanjutan untuknya hanya C diperoleh selepas ia diserahkan (lihat perenggan 6(2)).]

Notes

For cases on application to set aside bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2491–2523. D

Cases referred to

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

E **Legislation referred to**

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1969 r 96

Ridzal Dzulkifli (Michael Chai & Co) for the judgment creditor.
F *CW Leong (CW Leong & Associates) for the judgment debtor.*

Kang Hwee Gee J:

G **[1]** This is my oral judgment: (ex tempore)

[2] This is an appeal by the judgment debtor against the decision of the senior assistant registrar in dismissing the judgment debtor's application to set aside the bankruptcy notice issued against him.

H

[3] The notice arose from the judgment order of the High Court which read as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

I (BAHAGIAN DAGANG)

GUAMAN NO. D3-22-3155-1998

ANTARA

MBf LEASING SDN BHD … PLAINTIF

DAN

ENG POH HONG @ WONG CHOON MING … DEFENDAN

PADA 31 HARIBULAN MAC 2004 MAHKAMAH TERBUKA

PENGHAKIMAN

Tindakan ini telah dibicarakan di hadapan Yang Arif Hakim Dato' Zulkefli Ahmad Makinudin pada 11 haribulan September 2002, 2 haribulan Disember 2002, 30 haribulan Oktober 2003 dan 13 haribulan November 2003.

ADALAH DIHAKIMKAN bahawa perjanjian 'Put Option Agreement' di antara Plaintif dan Defendan bertarikh 1 haribulan November 1997 di perenggan-perenggan 3 dan 4 Pernyataan Tuntutan Terpinda bertarikh 19 haribulan Jun 2000 dilaksanakan secara spesifik.

DAN JUGA ADALAH DIHAKIMKAN bahawa Defendan membeli 550,000 saham-saham United Chemical Industries Bhd daripada Plaintif pada harga jualan RM8,852,250.00; dan membayar kepada Plaintif jumlah RM8,852,250.00 bersama dengan segala fee, kos dan bayaran yang berhubung dengan penjualan dan pemindahan milik saham-saham tersebut dalam masa tujuh (7) hari selepas penghakiman ini.

DAN AKHIRNYA ADALAH DIHAKIMKAN bahawa Defendan hendaklah membayar kepada Plaintif kos bagi tuntutan ini.

Bertarikh pada 31 haribulan Mac 2004.

Sgd.

NORLIZA BT OTHMAN

Timbalan Pendaftar

Mahkamah Tinggi

Kuala Lumpur

[4] The grounds of the appeal are as follows:

(1) The judgment obtained should not have been the basis of the application for the bankruptcy notice as this is not a final judgment for a debt due to the judgment creditor. The shares cannot be transferred as they were shares of a PN4 company and at the material time trading of shares were suspended and now no longer listed.

(2) Issue of res judicata — judgment creditor had earlier filed a bankruptcy notice based on the same judgment and had been dismissed by the

senior assistant registrar. The judgment creditor appealed to the judge in chambers but withdrew the appeal.

(3) The bankruptcy notice in any case was served on 18 July 2006 that is to say more than three months after it was issued on 17 March 2006 — contrary to r 96 of the Bankruptcy Rules 1969.

[5] Reply by counsel for the judgment creditor: (verbatim)

(1) See s 3(1)(i) of the Bankruptcy Act 1967:

> if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equal or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Submits the judgment order came within the ambit of 'requiring him to pay the judgment debt for sum ordered to be paid in accordance with the terms of the judgment'. Here there is an order requiring the judgment debtor to pay the sum of RM8,852,250.

(2) We did file an earlier bankruptcy notice. At the hearing of the appeal before Justice Vincent Ng we were asked whether we could file a fresh bankruptcy notice and we said we could. Hence we adhered to his direction but left the appeal where it was. There is no question of res judicata.

(3) We obtained the extension to serve this notice on 3 October 2006.

FINDINGS AND DECISION

[6] Res judicata is applicable in this case. A hearing of an appeal to a judge in chambers from the decision of the senior assistant registrar is to be treated as a 'one piece' hearing and to be heard by way of a rehearing by the judge as if the matter comes before him for the first time. See Supreme Court decision in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97. For so long as the hearing of the appeal before the judge in chambers is still pending the matter cannot therefore be construed as having been fully adjudicated upon.

[7] Nevertheless, the judgment debtor should be allowed to succeed in this appeal on the following grounds:

(1) The judgment order clearly states that the judgment creditor is entitled to the specific performance compelling the defendant to purchase the plaintiff's shares in United Chemical Industries Berhad at the price of RM8,852,250. This is not to say that the defendant must pay the plaintiff the sum of RM8,852,250. The order requires the defendant to purchase and not to pay a judgment debt. The order is therefore not a 'final judgment' to enable the judgment creditor to apply for a bankruptcy notice under s 3(1)(i) of the Bankruptcy Act 1967. The appropriate step that the judgment creditor should embark upon is to institute a contempt proceeding against the judgment debtor and not to petition for bankruptcy.

(2) It is also clear that the bankruptcy notice had expired when it was served on the judgment debtor on 18 July 2006, the extension having been obtained only after it was served.

[8] Appeal is allowed with costs.

Appeal allowed with costs.

Reported by Chew Phye Ken